IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-959

STATE OF FLORIDA,

Petitioner,

v.

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

On Petition for a Writ of Certiorari to
Florida's First District Court of Appeal

RESPONDENTS' BRIEF IN OPPOSITION

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The Respondents, Ken Kilpatrick and Cherie Kilpatrick, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of Florida's First District Court of Appeal in this case.

OPINIONS BELOW

The opinion of the District Court of Appeal (Petitioner's Appendix A-1) is reported as Kilpatrick v. State, 403 So.2d 1104 (Fla. 1st DCA 1981). The opinion of the Florida Supreme Court declining to reinstate an untimely Petition for Review in State v. Kilpatrick, ___So.2d ___, No. 61,349 (Fla. Sept. 14, 1982) is not yet reported. (Petitioner's Appendix A-25). Rehearing was

denied by the Florida Supreme Court on November 9, 1982. (Petitioner's Appendix A-33).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the decision sought to be reviewed is a decision of the "highest state court" within the meaning of 28 U.S.C. §1257.

2. Whether federal review in this Court by certiorari is precluded by the existence of an adequate and independent state ground for the decision below.

3. Whether the conclusion of the Court below that the "open fields" exception to the search warrant was inapplicable under the facts is contrary to any decision of this Court.

4. Whether the proposed "good faith" exception to the judicially-created Fourth Amendment exclusionary rule can apply to this case in view of the mandatory exclusionary rule contained in the text of the Florida Constitution at the time of the search.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article One Section Twelve of the Florida Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

STATEMENT OF THE CASE

The Respondents accept the Petitioner's Statement of the Case to the extent that it presents the course and disposition of the proceedings in the state courts. The facts of the case are stated fully in the decision of Florida's First District Court of Appeal. (Petitioner's Appendix A-1-7).

REASONS FOR DENYING THE WRIT

1. The decision sought to be reviewed is not a decision of the "highest state court" within the meaning of 28 U.S.C. §1257.

Petitioner contends that the jurisdictional requirements of Banks v. California, 395 U.S. 708 (1969) have been met. (Petition p.1,2). Presumably, the argument is that since the Florida Supreme Court dismissed a Petition for Discretionary Review the decision of the First District Court of Appeal is a decision of the "highest state court".

This is not the case, however, for the State Supreme Court did not merely decline to review the merits of the case. On the contrary, the Judgment of that Court (Petitioner's Appendix A-33) constitutes no more than a refusal to reinstate an untimely Petition for Review. The legal effect of the decision was to treat the Petition as a nullity.

The Petitioner's failure to seek timely discretionary review under the provisions of reasonable state procedural rules, and the ultimate dismissal resulting from that failure, is not at all the same as the discretionary denial of review upon the merits of a properly filed petition. In the latter case, the decision of the intermediate appeals court becomes a decision for the highest state court; in the former it does not.

The Court noted in Newman v. Gates, 204 U.S. 89 (1907) that if the state's highest court denies review for failure to comply with the requirements of a state procedural rule, "the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court". Id. at 95. So, too, in this case, the jurisdictional dismissal of the untimely petition has the same legal effect as the failure to file a petition at all.

Legal commentators have reasoned that in this setting the

requirement that state opportunities for appellate relief be exhausted becomes mingled with the independent state ground doctrine. 16 Wright FEDERAL PRAC. & PROC. §4007 (1977). This Court has made it clear on several occasions that noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider the federal question as not properly presented to the highest state court. Michigan v. Tyler, 436 U.S. 499 (1978); Parker v. Illinois, 333 U.S. 571 (1948).

Upon these arguments the Respondents respectfully submit that the decision sought to be reviewed is not a decision of the "highest state court". The Florida Supreme Court's refusal to consider the case resulted only from the Petitioner's procedural default and not from the exercise of discretion to decline review.

2. Federal review in this Court by certiorari is precluded by the existence of an adequate and independent state ground for the decision below.

The Opinion of Florida's First District Court of Appeal (Petitioner's Appendix A-1-8) does not mention the Fourth Amendment or any other provision of the Federal Constitution. Nor did the state appeals court cite any federal decision in support of its judgment. Rather, it appears that the court relied exclusively upon Florida precedents.

Since Petitioner has conceded that the Motion to Suppress was based in part upon an alleged violation of the Florida Constitution, (Petition p.4) and since the opinion under review here did not refer to any federal issue, this Court should hold that

the decision rests upon an adequate and independent state ground. Consequently, the Court should deny the instant Petition for Writ of Certiorari.

The mere possibility that the decision may rest upon a state ground is all that is necessary to deny the relief Petitioner requests in this Court. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). That result is required even if the law supporting the state ground is the same as the federal law. Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965).

3. The conclusion of the Court below that the "open fields" exception to the search warrant was inapplicable under the facts is not contrary to any decision of this Court.

Assuming for the purpose of argument that the Court below decided a federal question at all, it did not do so in violation of any controlling precedent set by this Court. The implied rejection of the Petitioner's "open fields" argument was proper inasmuch as the facts of the case fully support the lower court's holding that the marijuana was within the curtilage of the Respondent's residence.

Petitioner has correctly noted that this Court granted certiorari in Florida v. Brady, 406 So.2d 1093 (Fla. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982)(No. 81-1636) to review the holding of the Florida Supreme Court that the "open fields" doctrine set forth in United States v. Hester, 265 U.S. 57 (1924) was modified by the subsequent decision of this Court in Katz v. United States, 389 U.S. 347 (1967). However, the resolution of the issue presented in Brady, i.e., the circumstances, if any, under which an individual may create an expectation of privacy in an open field, will not have any effect upon

the outcome of this case, for the evidence presented below does not in any event establish that the marijuana was growing in an open field.

Petitioner succeeds in criticizing the lower court's conclusion that the marijuana was within the "curtilage" of the residence only by misstating the facts.[1] The officer testified that he drove 1½ miles down a private road (TR-36) upon what he knew to be a farm owned by Dillon Kilpatrick (TR-35) when he observed marijuana growing at the trailer of the Respondents Ken and Cherie Kilpatrick (TR-28,29).

The facts of this case are not at all comparable to the facts of DeMontmorency v. State, ___So.2d___, 1981 F.L.W. 1631 (Fla. 1st D.C.A. July 10, 1981) and Florida v. Brady, supra, referred to by the Petitioner. In DeMontmorency, for example, the marijuana was not only growing a "distance equal

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[1]Petitioner contends that the officer observed the plants in plain view while still in his car before he could even observe the Respondent's trailer. (Petition p.12). This fact was drawn from a previous misstatement in the Petitioner's state court brief; it is not contained in the record. The officer testified that he was 20 to 30 yards away when he first observed three plants growing outside the trailer. (TR-28). Petitioner contends that the plants were 40 to 50 yards from the trailer (Petition p. 6) but again that is incorrect. There were some plants that far away but they were not the plants which were the subject of the observation. Those plants were actually found near a creek behind the trailer long after the officer made the original observation and long after he had gotten out of his car. (TR-37). The plants which were the subject of the initial observation were growing in a "little flower bed" on the "west end of the trailer". (TR-37).

to more than two football fields" from the house trailer, but it was apparently visible from land which was not occupied by any member of the defendant's family. Similarly, in Brady, the officers crossed private land to take up a surveillance several hundred yards from a remote airfield which was not anywhere near the defendant's residence.

The District Court of Appeal below certainly had the right to find that the marijuana plants growing on the "west end of the trailer" in a "little flower bed" (TR-37) were within the "curtilage" of the Respondent's house trailer. In spite of the Petitioner's insistence that this case should have been governed by the "open fields" exception, the facts clearly demonstrate that it was unnecessary for the courts below to even consider that. Thus, it appears tnat even if this Court were to disagree with the treatment of the "open fields" issues presented in Brady and DeMontmorency, there would be no reason to grant certiorari in this case.

In summary of these points the Respondents respectfully submit the instant Petition should be denied. The Florida courts have the right to make a factual determination that the marijuana plants were within the "curtilage" of the residence, and that the open fields doctrine was therefore inapplicable. The Petitioner has failed to demonstrate any valid reason to disturb these findings by the exercise of federal jurisdiction.

4. The proposed "good faith" exception to the judicially-created Fourth Amendment exclusionary rule cannot apply to this case in view of the mandatory exclusionary rule contained in the text of the Florida Constitution at the time of the search.

Finally, the Petitioner contends that this Court should

grant certiorari pending a decision on the merits in Illinois v. Gates, 85 Ill.2d 376, 423 N.E.2d 887 (1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982)(No. 81-430) on the issue of the proposed "good faith exception" to the exclusionary rule. Respondents respectfully submit that the resolution of that issue will have no bearing on any Florida case prior to the November, 1982 revision of Article 1 Section 12 of the Florida Constitution. The previous version of that section, which was in effect at all times material to this case, contained an explicit guarantee of the judically-created "exclusionary rule", which by its express terms required the exclusion of all illegally seized evidence.

The Federal Exclusionary Rule came about by judicial construction because the Fourth Amendment to the United States Constitution relating to unlawful searches and seizures contains no sanctions to insure its compliance. The Fourth Amendment simploy provides:

> ...the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> (U.S. Constitution Amendment IV)

Since the Federal Exclusionary rule is itself a creature of judicial construction fashioned by this Court to insure compliance with the Constitution, this Court is free to consider on a case by case basis the situations to which it applies. The analysis of policy arguments such as those presented by the Petitioner in Illinois v. Gates, may cause the Court to decline to apply the rule in certain situations. This is not the case in Florida, however.

Prior to the November, 1982 revision of Article 1, Section 12 of the Florida Constitution, the state courts were not free to consider the wisdom or lack of wisdom in applying the exclusionary rule.[2] Under the provision then in effect the exclusion of illegally seized evidence was mandated in all cases. Unlike the Federal Constitution, the state constitutional provision governing this case, does provide a remedy which must be used. Article 1, Section 12, Fla. Const. (1969) states:

> ...Searches and seizures. - The right of the people to secure in their persons, houses, papers and effects against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence. (Emphasis supplied.)

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[2]Article 1, Section 12 of the Florida constitution was amended effective January 4, 1983. Under the new version there is no longer an explicit exclusionary rule. Instead the amendment provides:

> "This right (to be free from unreasonable searches and seizures) shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

The language "shall not be admissible in evidence" could not have been a clearer directive to the courts that illegally obtained evidence shall not be used, period. The State Constitution does not say that such evidence shall not be admitted except when the officer obtains it in "good faith" nor does it make any other exception to the rule. It simply says that such evidence shall not be admitted.

Perhaps the Fourth Amendment will ultimately be interpreted to allow for a "good faith" exception. Even if that is so, however, Respondents would be entitled to rely upon a state constitutional provision directing the exclusion, without exception, of all illegally seized evidence. States are certainly free to adopt a rule which provides a criminal defendant a greater degree of protection than that which is required as a minimum by the Federal Constitution.

For each of these reasons the Respondents contend that the decision in Illinois v. Gates, supra, will not have any effect upon this case. Since the state court decision here to exclude the evidence can be based upon an independent provision contained in the State Constitution, this Court is without jurisdiction to review the the correctness of the decision.

CONCLUSION

The Petition for Writ of Certiorari filed by the State of Florida should be denied.

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ATTORNEY FOR RESPONDENTS

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

No. 82-959

STATE OF FLORIDA,

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v.

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of the Rules of this Court presently in effect, Motion is hereby made that Respondents be allowed to proceed in forma pauperis. The Motion is supported by the Respondents' Affidavits attached hereto.

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR RESPONDENTS

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

No. 82-959

STATE OF FLORIDA,	)
Petitioner,	)
v.	)
KEN KILPATRICK and CHERIE KILPATRICK	)
Respondents.	)

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

AFFIDAVIT IN SUPPOR OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA
COUNTY OF LEON

Before me personally appeared Cherie Kilpatrick, who being first duly sworn, deposes and says:

1. This is an Affidavit in support of a Motion for Leave to Proceed in Forma Pauperis in the Supreme Court of the United States on a Petition for Writ of Certiorari requesting review of a judgment of a Florida Supreme Court.

2. I am a citizen of the United States and a resident of the State of Florida presently residing in Jackson County, Florida.

3. I am a student at the Tallahassee Community College in Tallahassee, Florida. I am not presently employed nor am I receiving an income from any source other than employment.

4. Because of my poverty I am unable to pay the cost of preparing printed briefs in opposition to the State's Petition for Writ of Certiorari filed in this Court.

5. I have requested the preparation of a Motion for Leave to Proceed in Forma Pauperis in good faith solely for the reasons set forth in this Affidavit. I believe that the arguments made in opposition to the State's Petition for Writ of Certiorari are meritorious and for the reasons set forth more fully in the typewritten brief filed on my behalf, I believe that I am entitled to an Order denying the State's Petition.

CHERIE KILPATRICK

Sworn to and subscribed
before me this ___ day of
February, 1983.

(SEAL)

Notary Public

Commission Expires

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT

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STATE OF FLORIDA,

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PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA
COUNTY OF LEON

Before me personally appeared Ken Kilpatrick, who being first duly sworn, deposes and says:

1. This is an Affidavit in support of a Motion for Leave to Proceed in Forma Pauperis in the Supreme Court of the United States on a Petition for Writ of Certiorari requesting review of a judgment of a Florida Supreme Court.

2. I am a citizen of the United States and a resident of the State of Florida presently residing in Jackson County, Florida.

3. I am a agricultural pilot who is presently unemployed and who has been unemployed since October of 1982. I am not presently receiving any income from my employment or from any other source.

4. Because of my poverty I am unable to pay the cost of preparing printed briefs in opposition to the State's Petition

for Writ of Certiorari filed in this Court.

5. I have requested the preparation of a Motion for Leave to Proceed in Forma Pauperis in good faith solely for the reasons set forth in this Affidavit. I believe that the arguments made in opposition to the State's Petition for Writ of Certiorari are meritorious and for the reasons set forth more fully in the typewritten brief filed on my behalf, I believe that I am entitled to an Order denying the State's Petition.

KEN KILPATRICK

Sworn to and subscribed
before me this ___ day of
February, 1983.

(SEAL)

Notary Public

Commission Expires

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ATTORNEY FOR RESPONDENT